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IN THE

Supreme Court of the United States

October Term, [redacted] 1970

No. [redacted] 214

WESTERN LAUNDRY AND LINEN RENTAL CO. and MORRIS A. HAZAN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Reply Brief in Opposition to Petition for Writ of Certiorari.

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IN THE

Supreme Court of the United States

October Term, 1969
No. 1644

WESTERN LAUNDRY AND LINEN RENTAL CO. and MORRIS A. HAZAN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Reply Brief in Opposition to Petition for Writ of Certiorari.

The Solicitor General (Br. pp. 1, 5) raises the question of the filing of the Petition for Certiorari on June 2, 1970; the time for filing had been extended by Mr. Justice Douglas to May 29, 1970. We present herewith (Appendix hereto) the affidavits of Attorney Russell E. Parsons and of printer Dean-Standefer. May 29, 1970, was a Friday. May 30, a Saturday, was Memorial Day. The petition was deposited, as shown in the attached affidavits, at the Los Angeles International Airport facility of REA Air Express just after midnight of May 27, viz. at 12:15 A.M. of May 28, 1970.

The time of deposit would seem to have left ample time for Air Express to deliver to the Court on the 29th of May.

It is our understanding, that the Court might not have deemed the filing to have been late if the Petition had been received on said post-holiday, Monday, June 1, 1970.

REA Air Express delayed delivery of the Petition until Tuesday, June 2, 1970.

Petitioner respectfully moves that the Court waive the limitation of Rule 22(2), in view of the circumstances, and permit consideration of the merits of the Petition. *Heflin v. United States,* 358 U.S. 415, 418, n. 7, 3 L. Ed. 2d 407, 410.

ARGUMENT.

I.

Partnerships Are Not Entities Punishable Under the Sherman Act, but Only Individual Partners Can Be Prosecuted and Punished.

We have discussed this issue under Point II of our Petition for Certiorari (Pet. pp. 12-17). The Solicitor General, in the *Opposition* (Op. pp. 5-6), relies on *United States v. A. & P. Trucking Co.*, 358 U.S. 121, 2 L. Ed. 2d 165. It is apparent that a dispute arises as to the interpretation of this Court's views in said case. Four Justices, Mr. Justice Douglas, Mr. Justice Black, Mr. Justice Frankfurter, and Mr. Justice Whittaker dissenting in part, held that the entity theory had not been extended to partnerships under the Uniform Partnership Law, and that partnerships should be treated in the pluralistic sense. The majority of the Court did not disagree, but rather based their opinion on the wording of Title 49 U.S.C. Sec. 322 (a), the Motor Carrier Act, which expressly includes "partnerships" as coming within the definition of "persons". Thus A. & P. is not authority for the asserted prosecutability of partnerships under the Sherman Act, even under the majority opinion. The dissenting opinion adds emphasis to the inappositiveness of the Government's reference.

The Sherman Act, on the other hand, omits partnerships (it also omits joint ventures) in its defining list of prosecutable subjects. As our Petition further shows, the various rules of construction, including those relat-

ing to criminal statutes, seems to compel the holding that partnerships (and joint ventures) are outside the prosecutable scope of the Sherman Act, not partnerships, not joint ventures, but only partners are subject, we urge, to prosecution for offenses under the Sherman Act.

Without deemphasizing the argument in the Petition, but rather to underscore it, we add that in *Application of Weiss*, 283 Fed. Supp. 97, Weiss was attempting to avoid subpoena of the corporate records of a corporation, the stock of which was owned by himself and his wife. He contended that the corporation was his *alter ego* and that, as in a partnership, he had the right to raise the issue of self-incrimination. The court held that this was a corporation and not a partnership and then stated (p. 98):

> "While the analogy urged upon this court may well have greater validity today than it did at some prior time, *a significant conceptual dichotomy still exists between partnerships and corporations.* In most instances, American partnership law continues to follow the British course of treating the partnership in the pluralistic sense; i.e. it refuses to recognize the existence of a legal entity distinct from the individual partners. See, *United States v. A. & P. Trucking Co.*, 358 U.S. 121, 128, 79 S. Ct. 203, 208, 3 L. Ed. 2d 165 (1958); *Helvering v. Smith*, 90 F. 2d 590 (2d Cir. 1937). In the context of the subject application, this means that if nothing more is shown, the books and records of a traditional partnership are within the privilege availabe to any or all of the partners. See. *United States v. Cogan*, 257 F. Supp. 170, 174 (C.D.N.Y. 1966)" (Emphasis supplied.)

II.

The Prosecution and Punishment of Both Western and Hazan Constituted Double Jeopardy and Double Punishment in Violation of the Fifth Amendment:

We have discussed this issue under Points I and II of our Petition for Certiorari (pp. 7-11, 17-20). The Solicitor General again relies primarily on the *A. & P. Trucking Co.* case, but also contends that the *nolo contendere* plea was waived by failure to set up the plea with the statutory period. However, our position is based on the proposition that double jeopardy and double punishment are both proscribed by the Fifth Amendment, and that there were violations of petitioners' constitutional rights when both Western and Hazen were prosecuted and punished for the same offense. The plea of *nolo contendere* did not preclude the raising of the constitutional violations of the Fifth Amendment proscribing double jeopardy and double punishment.

Partners under the Act are different from officers or employees of a corporation. The Fifth Amendment applies to say since the fine can be paid out of the partnership assets that Hazen was not punished by the fine of $25,000.00 levied against Western, is to close one's eyes to the facts.

Under partnership law, a partner is liable for debts of the partnership. The debtor may, if he so chooses, proceed directly against the partner's assets even without proceeding against the partnership assets or he may proceed simultaneously against both. Hazen is liable for the fine against Western whether the assets of Western are sufficient to pay the fine or not.

Moreover, even if we assume (there is no showing so requiring) that the collection of the fine against Western is obtained from Western's assets, Hazan has a nineteen percent (19%) interest in the partnership. The payment of the $25,000.00 fine levied against Western will reduce its assets *pro tanto*, and the value of Hazan's interest in partnership assets will be diminished. The consequence of the levy of fines both on Hazan and the partnership is thus to punish him twice, contentions to the contrary notwithstanding.

Conclusion.

In conclusion we respectfully pray this Honorable Court to waive the untimely filing of the Petition for Certiorari and to grant the same.

Respectfully submitted,

GERALD H. GOTTLIEB,
RUSSELL E. PARSONS,
Attorneys for Petitioners.

APPENDIX.

Affidavit of D. A. Standefer.

State of California, County of Los Angeles—ss.

D. A. Standefer, being first duly sworn, deposes and says:

That he is part owner of a printing business doing business under the name of Dean-Standefer Company, which prints briefs on appeal, etc., for attorneys-at-law; that he printed at the instance and request of attorney Russell E. Parsons the Petition for Certiorari in the Supreme Court of the United States in the case of Western Laundry and Linen Rental Co., et al., vs. United States, October Term, 1970, No. 214 (originally October Term, 1969, No. 1644).

That said Russell E. Parsons delivered the draft of said Petition to affiant for printing on or about May 21st, 1970, and advised affiant that the petition had to be filed in the Office of the Clerk of the United States Supreme Court not later than May 29th, 1970; that affiant finished the printing late on the night of May 27th, and personally delivered the original and forty copies to R.E.A. about 12.35 a.m. on May 28th, at the International Airport in Los Angeles for transmission to said Clerk in Washington D.C.; that affiant was advised by the employee in charge of the office of R.E.A. at the airport that the package containing said petition and copies would be delivered not later than the morning of May 29th; that in reliance on the said assurance of said R.E.A. employee, affiant delivered the said package to R.E.A. at the airport and prepaid air shipping charges and insurance amounting to $9.49.

/s/ D. A. Standefer

Subscribed and sworn to before me this 17th day of August, 1970.

/s/ Armida Bay
Notary Public for the State of California
[Seal]

Affidavit of Russell E. Parsons.

State of California, County of Los Angeles—ss.

Russell E. Parsons, being first duly sworn, deposes and says:

He is an attorney-at-law licensed to practice in all courts in the State of California and in the United States District Court, the United States Court of Appeals for the Ninth Circuit and the United States Supreme Court; that he is one of the attorneys for petitioner in connection with the petition of Western Laundry and Linen Rental Co. and Morris A. Hazan for certiorari October Term 1970 No. 214 (originally October Term 1969 No. 1644).

In his opposition to the petition, the Solicitor General has contended that the filing of the petition was untimely since it appears to have been filed on June 2, 1970, instead of on or before May 29, 1970.

The late filing was neither the fault of attorneys for petitioner nor of the printer; affiant delivered the draft of the petition to the printer Dean-Standefer Company on or about May 21, 1970, for printing; affiant was informed by D. A. Standefer, whose affidavit is attached, that he mailed it about midnight of May 27, 1970, postage prepaid copies of the petition to the Solicitor General of the United States, to the United

States District Court and to the United States Court of Appeals for the Ninth Circuit as appears from his declaration attached to the petition; that he delivered the original and forty copies of the petition to R.E.A. Air Express at 12:35 a.m. on May 28, 1970, at the Los Angeles Airport and prepaid the shipping and insurance charges as shown by the xerox copy of the shipping receipt attached hereto; that he was assured by the clerk at R.E.A. that the package would be delivered to the Office of the Clerk of the Supreme Court either on that day or before the morning of May 29th.

Affiant has filed numerous petitions for certiorari with the Supreme Court and generally has used R.E.A. Air Express because of its quicker and better service than the mails; that affiant believes that R.E.A. has in each instance delivered packages of Certiorari petitions and other briefs in the said Clerk's Office the day after delivery of the same by affiant or his printer to R.E.A. in Los Angeles.

/s/ Russell E. Parsons

Subscribed and sworn to before me this 17th day of August, 1970.

/s/ Armida Bay

Notary Public for the State of California.

[Seal]